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9 UNITED STATES DISTRICT COURT
10 EASTERN DISTRICT OF CALIFORNIA

11 L.H. MEEKER, *et al.*,

12 Plaintiffs,

13 v.

14 BELRIDGE WATER STORAGE
15 DISTRICT, *et al.*,

16 Defendants.

17 1:05-CV-00603 OWW SMS

18 ORDER DENYING PLAINTIFFS'
19 MOTION FOR SUMMARY JUDGMENT
20 (DOC. 117).

21 I. INTRODUCTION

22 This case concerns water entitlements appurtenant to lands
23 located in the Belridge Water Storage District ("Belridge") in
24 Kern County, California. Some of Plaintiffs' lands are serviced
25 by Belridge's water supply system ("Service Area" or "SA" lands),
26 while some are not ("Non-Service Area" or "NSA" lands).

27 Plaintiffs assert, generally, that Belridge and certain members
28 of Belridge's Board of Directors, namely William D. Phillimore,
29 Robert E. Baker, and Larry Starrh ("Defendants"), violated
30 various provisions of California law by passing a resolution on

February 16, 2005, that prohibited the transfer of water entitlements from NSA lands to SA lands. On May 3, 2005, Plaintiffs filed suit in federal court, invoking diversity jurisdiction. (Doc. 1.) After two rounds of motions to dismiss, all but two of Plaintiffs' claims under state law -- for violations of the Political Reform Act ("PRA") and the prohibition of unfair competition -- have been eliminated from the case.

Plaintiffs now move for summary judgment on the PRA claim as to Defendant Starrh. Because there are substantial disputes as to material facts related to one element of this claim, the motion is DENIED.

II. BACKGROUND

Extensive factual background on the parties, their land holdings, and economic interests is set forth in prior decisions. Only the facts pertinent to this motion are presented here.

Plaintiffs own land within Belridge, which contracts with the Kern County Water Authority ("KCWA") to receive water. KCWA in turn contracts with the California Department of Water Resources ("DWR") to receive a supply of water from the State Water Project ("SWP").

Belridge encompasses lands that are currently served by Belridge's water distribution system ("Service Area" or "SA" lands), as well as land that is entitled to receive water but is not currently served by the distribution system ("Non-Service Area" or "NSA" lands). Plaintiffs own both SA and NSA land in Belridge. All SA and NSA lands are entitled to receive water

1 pursuant to recorded contracts ("Landowner Contracts") with
2 Belridge.

3 Belridge is a landowner voting Water Storage District
4 governed by a five-member Board of Directors ("Board"). See Cal.
5 Water Code § 41000.

6 A. The Defendants.

7 Defendants William Phillimore, Robert Baker, and Larry
8 Starrh are members of Belridge's Board. Larry Starrh, the
9 subject of the pending motion for summary judgment, is the
10 Belridge Board's Treasurer. The three have been Board members
11 continuously since 1998. (UMF 4.)

12 Mr. Starrh is also a partner in Starrh & Starrh Cotton
13 Growers, which pays him a salary in excess of \$100,000 per year.

14 B. The Top Contract.

15 Certain entities in Belridge, including entities with whom
16 the three individual Defendants in this case have business
17 relationships, are parties to a 1999 contract with Belridge,
18 known as the "Top Contract." This agreement allows such
19 contracting parties to purchase water that is allocable (but
20 undeliverable) to the NSA lands. The water available for
21 purchase under the Top Contract is known as "Top Water." The
22 parties to the Top Contract purchase Top Water from Belridge and
23 use it on their SA lands.

24 Specifically, parties to the Top Contract purchase from
25 Belridge portions of the annual entitlement associated with NSA
26 lands as of January 1, 1999, less any portion transferred outside
27 the NSA after January 1, 1999. Each party to the Top Contract is
28 entitled to purchase a certain percentage of the NSA entitlement.

1 The parties to the Top Contract are not required to pay any
2 transfer charges to change the place of use of Top Water from NSA
3 to SA lands.

4 In exchange, the parties to the Top Contract agreed to make
5 annual payments to Belridge. These fees help to cover Belridge's
6 costs (under Belridge's KCWA contract) and the costs of
7 delivering water to the SA lands.

8 Belridge New Farming LLC (62.84%), Starrh & Starrh Cotton
9 Growers (16.61%), and Paramount Land company (14.46%) are the
10 three largest parties to the Top Contract. The remaining 6.09%
11 is held by others.

12 C. Plaintiffs' Request to Use NSA Water on SA lands.

13 Plaintiffs requested permission to use the water
14 entitlements associated with their NSA lands on SA lands. In
15 order to obtain permission to use NSA-attributable water on SA
16 land, Plaintiffs' Landowner Contracts must be amended. Without
17 amendment, Plaintiffs cannot use their NSA water entitlements.

18 On January 10, 2005, Plaintiffs sent a letter to the Board,
19 notifying the Board that they intended to "request to have
20 [their] non service area water activated into the service area.
21 More specifically, [they] plan on farming with this water with
22 Sandridge Farms and or other existing land owners and we depend
23 on this water for the economic use of our lands in the district."
24 (Doc. 18, Hughes Decl., Ex. D.) The letter also states:

25 We have been informed of a series of meetings the
26 district has had regarding two requests that land
27 owners have made in early 2004. The two land owners
28 are Sandridge and Chevron. We have been made aware of
an identical request from a land owner, Stiefvater,
which was approved under the same Board Policies that
are currently in place. I have been informed that

1 several of the current Board Members have been
2 participating in discussions, talked to the manager and
3 have voted to delay the transfer of this water. It
4 appears these Board members currently may have free use
5 of about 10,000 acre feet of water of this character
6 through a unique arrangement set up by the Board and
7 called top contracts. If the foregoing is true, the
8 value of the top contracts of these Board Members is in
9 excess of 10 million dollars assuming a value of \$1,000
10 per acre foot.

11 *(Id.)*

12 The operative effect of Plaintiffs' proposed transfer from
13 NSA to SA lands would be to decrease the volume of water
14 available for distribution under the Top Contract.

15 D. The Allegedly Improper/Unlawful Vote.

16 On January 11, 2005, the Board held a regularly scheduled
17 board meeting. The agenda for that meeting referenced the
18 following item:

19 Legal Counsel:

20 (a) Report re: Charge for Permanent Transfers from
21 Non-service Area to Service Area.

22 (Doc. 25, Carlson Decl., Ex. 7). No vote on this issue was taken
23 during the January 11, 2005 meeting. Instead, the meeting was
24 adjourned until February 16, 2005 to allow time for public
25 comment and for the board to consider the matter.

26 The agenda for the February 16, 2005 meeting includes the
27 following modified agenda item:

28 Other Business:

29 a. Policy re: Permanent Transfer of Annual
30 Entitlement from Non-Service Area to Service area.

31 (Doc. 19, Req. for Judicial Notice, Ex. C.)

32 On February 16, 2005, Defendant Baker moved to adopt a
33 policy to prohibit permanent transfers of water from NSA land to
34 SA land.

1 SA land. The Board voted 3-2 to adopt that policy. The three
2 votes in favor of the prohibition were Defendant Directors
3 William Phillimore, Robert Baker and Larry Starrh.

4 On March 18, 2005, in accordance with the exhaustion
5 requirements of the Brown Act, Cal. Gov. Code § 54960.1,
6 Plaintiffs sent a letter to the Board demanding that the action
7 be nullified because the vote violated the terms of the Brown
8 Act. On April 18, 2005, the Board refused to nullify the vote.

9 E. The Sale of Plaintiffs' Property to Sandridge Partners
10 And Sandridge's Parallel State Lawsuit.

11 Since the commencement of these proceedings, Plaintiffs have
12 sold their NSA lands to a third party, Sandridge Partners
13 ("Sandridge"), which owns land in both the NSA and SA. On
14 October 19, 2006, Sandridge filed a complaint, nearly identical
15 to the Complaint in this case, against the Defendants in Kern
16 County Superior Court Case No. S-1500-CV 259407. One of the
17 causes of action in the Kern County case is identical to the PRA
18 claim here, another is the same as the unfair competition claim
19 still pending here, and a third is based upon the Government Code
20 § 1090 claim previously dismissed by this court.

21 Defendants filed a motion for summary adjudication of the
22 PRA claim in the Kern County case, based on the special rule for
23 landowner voting districts under the public generally exception.
24 That motion was denied.

25 III. STANDARD OF REVIEW - MOTION FOR SUMMARY JUDGMENT

26 Summary judgment is warranted only "if the pleadings,
27 depositions, answers to interrogatories, and admissions on file,
28 together with the affidavits, if any, show that there is no

1 genuine issue as to any material fact." Fed. R. Civ. Pro. 56(c);
2 *California v. Campbell*, 138 F.3d 772, 780 (9th Cir.1998).
3 Therefore, to defeat a motion for summary judgment, the
4 non-moving party must show (1) that a genuine factual issue
5 exists and (2) that this factual issue is material. *Id.* A
6 genuine issue of fact exists when the non-moving party produces
7 evidence on which a reasonable trier of fact could find in its
8 favor viewing the record as a whole in light of the evidentiary
9 burden the law places on that party. See *Triton Energy Corp. v.*
10 *Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995); see also
11 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252-56 (1986).
12 Facts are "material" if they "might affect the outcome of the
13 suit under the governing law." *Campbell*, 138 F.3d at 782
14 (quoting *Anderson*, 477 U.S. at 248).

15 The non-moving party cannot simply rest on its allegations
16 without any significant probative evidence tending to support the
17 complaint. *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th
18 Cir.2001). The plain language of Rule 56(c) mandates the entry
19 of summary judgment, after adequate time for discovery and upon
20 motion, against a party who fails to make a showing sufficient to
21 establish the existence of an element essential to the party's
22 case, and on which that party will bear the burden of proof at
23 trial. In such a situation, there can be "no genuine issue as to
24 any material fact," since a complete failure of proof concerning
25 an essential element of the nonmoving party's case necessarily
26 renders all other facts immaterial. *Celotex Corp. v. Catrell*,
27 477 U.S. 317, 322-23 (1986). The more implausible the claim or
28 defense asserted by the non-moving party, the more persuasive its

1 evidence must be to avoid summary judgment. See *United States ex
2 rel. Anderson v. N. Telecom, Inc.*, 52 F.3d 810, 815 (9th
3 Cir.1996). Nevertheless, the evidence must be viewed in a light
4 most favorable to the nonmoving party. *Anderson*, 477 U.S. at
5 255. A court's role on summary judgment is not to weigh evidence
6 or resolve issues; rather, it is to determine whether there is a
7 genuine issue for trial. See *Abdul-Jabbar v. G.M. Corp.*, 85 F.3d
8 407, 410 (9th Cir.1996).

9 IV. DISCUSSION

10 A. Standing.

11 Defendants assert that Plaintiffs lack standing because they
12 sold their land to Sandridge.

13 To have standing, a plaintiff must show three elements.

14 First, the plaintiff must have suffered an "injury in
15 fact"--an invasion of a legally protected interest
16 which is (a) concrete and particularized and (b) actual
17 or imminent, not conjectural or hypothetical. Second,
18 there must be a causal connection between the injury
19 and the conduct complained of-- the injury has to be
fairly traceable to the challenged action of the
defendant, and not the result of the independent action
of some third party not before the court. Third, it
must be likely, as opposed to merely speculative, that
the injury will be redressed by a favorable decision.

20 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)
21 (internal citations and quotations omitted).

22 The Supreme Court has described a plaintiff's burden of
23 proving standing at various stages of a case as follows:

24 Since [the standing elements] are not mere pleading
25 requirements but rather an indispensable part of the
26 plaintiff's case, each element must be supported in the
27 same way as any other matter on which the plaintiff
28 bears the burden of proof, i.e., with the manner and
degree of evidence required at the successive stages of
the litigation. At the pleading stage, general factual
allegations of injury resulting from the defendant's
conduct may suffice, for on a motion to dismiss we
presume that general allegations embrace those specific
facts that are necessary to support the claim. In

1 response to a summary judgment motion, however, the
2 plaintiff can no longer rest on such "mere
3 allegations," but must "set forth" by affidavit or
4 other evidence "specific facts," Fed. Rule Civ. Proc.
5 56(e), which for purposes of the summary judgment
motion will be taken to be true. And at the final
stage, those facts (if controverted) must be supported
adequately by the evidence adduced at trial.

6 *Id.* at 561; *see also Churchill County v. Babbitt*, 150 F.3d 1072,
7 1077 (9th Cir. 1998).

8 Plaintiffs contract of sale with Sandridge was signed March
9 14, 2005. (Doc. 122, Def. Opp. Mot. Sum. J., Ex. J at 29.) The
10 agreement was to close in 120 days. (*Id.* at § 2.2.) Defendants
11 argue that, given that the 120 day period has passed, Plaintiffs
12 have no further interest in the Property and therefore have no
13 personal interest in this lawsuit and hence no standing to sue.
(Doc. 122 at 6.)

14 Plaintiffs rejoin that the contract is still "wholly
15 executory." (Doc. 125 at 2.) According to a declaration filed
16 on June 12, 2006 by one of the Plaintiffs, Mr. Meeker, the
17 purpose of the contract of sale is to allow Sandridge access to
18 the water entitlement appurtenant to Plaintiffs' land. (Doc. 71
19 at ¶6.) Without access to water, Plaintiffs' land is of little
20 value, as recognized in the contract of sale, which assigns 96%
21 of the value of the property to the water entitlement. (Doc.
22 122, Ex. J at 27.) According to Meeker, after the February 16,
23 2005 vote, Plaintiffs and Sandridge agreed to delay the close of
24 the property sale for up to five years. (Doc. 71 at ¶10.)
25 Defendants do not dispute this assertion. Accordingly,
26 Plaintiffs still hold title to the land in question and their
27 economic interests give them standing to challenge regulations
28 that impact the value and alienability of that property.

1 B. Elements of a Prohibited Conflict of Interest under
2 California's Political Reform Act.

3 The elements of a prohibited conflict of interest under the
4 Political Reform Act of 1974 (PRA) are set out in California
5 Government Code § 87100 and Title 2 of the California Code of
6 Regulations §§ 18700 et seq. Government Code § 87100 provides:

7 No public official at any level of state or local
8 government shall make, participate in making or in any
9 way attempt to use his official position to influence a
10 governmental decision in which he knows or has reason
11 to know he has a financial interest.

12 Therefore, a prohibited conflict of interest exists where: (1)
13 the decision maker is a "public official" of a state or local
14 government; and (2) the public official is making, participating
15 in making, or influencing a government decision in which he knows
16 or has reason to know he has a financial interest.

17 Title 2 of the California Code of Regulations, section
18 18702, promulgated by the Fair Political Practices Commission,
19 provides guidance to determine if a prohibited conflict of
20 interest exists:

21 (a) No public official at any level of state or local
22 government may make, participate in making or in any
23 way use or attempt to use his/her official position to
24 influence a governmental decision in which he/she knows
25 or has reason to know he/she has a disqualifying
26 conflict of interest. A public official has a conflict
27 of interest if the decision will have a reasonably
28 foreseeable material financial effect on one or more of
 his/her economic interests, unless the public official
 can establish either: (1) that the effect is
 indistinguishable from the effect on the public
 generally, or (2) a public official's participation is
 legally required.

2 2 Cal. Code Regs. § 18700(a).

2 Specifically, "to determine whether a given individual has a
2 disqualifying conflict of interest under the Political Reform

1 Act," the following eight step analysis applies:

2 (1) Determine whether the individual is a public
3 official, within the meaning of the Act. (See
4 Government Code section 82048; 2 Cal. Code Regs. §
5 18701.) If the individual is not a public official, he
6 or she does not have a conflict of interest within
7 the meaning of the Political Reform Act.

8 (2) Determine whether the public official will be
9 making, participating in making, or using or attempting
10 to use his/her official position to influence a
11 government decision. (See 2 Cal. Code Regs. § 18702.)
12 If the public official is not making, participating in
13 making, or using or attempting to use his/her official
14 position to influence a government decision, then he or
15 she does not have a conflict of interest within the
16 meaning of the Political Reform Act.

17 (3) Identify the public official's economic interests.
18 (See 2 Cal. Code Regs. § 18703.)

19 (4) For each of the public official's economic
20 interests, determine whether that interest is directly
21 or indirectly involved in the governmental decision
22 which the public official will be making, participating
23 in making, or using or attempting to use his/her
24 official position to influence. (See 2 Cal. Code Regs.
25 § 18704.)

26 (5) Determine the applicable materiality standard for
27 each economic interest, based upon the degree of
28 involvement determined pursuant to California Code of
Regulations, title 2, section 18704. (See 2 Cal. Code
Regs. § 18705.)

(6) Determine whether it is reasonably foreseeable that
the governmental decision will have a material
financial effect (as defined in California Code of
Regulations, title 2, section 18705) on each economic
interest identified pursuant to California Code of
Regulations, title 2, section 18703. (See 2 Cal. Code
Regs. § 18706.) If it is not reasonably foreseeable
that there will be a material financial effect on any
of the public official's economic interests, he or she
does not have a conflict of interest within the meaning
of the Political Reform Act. If it is reasonably
foreseeable that there will be a material financial
effect on any of the public official's economic
interests, and the official does not participate in the
decision, determine whether the official may segment
the decision into separate decisions to allow his or
her participation in subsequent decisions. (See 2 Cal.
Code Regs. § 18709.)

(7) Determine if the reasonably foreseeable financial effect is distinguishable from the effect on the public generally. If the official can establish that the reasonably foreseeable material financial effect on his or her economic interest is indistinguishable from the effect on the public generally, he or she does not have a conflict of interest within the meaning of the Political Reform Act. If the reasonably foreseeable material financial effect on the public official's economic interest is distinguishable from the effect on the public generally, he or she has a conflict of interest within the meaning of the Political Reform Act. (See 2 Cal. Code Regs. § 18707.)

(8) Determine if the public official's participation is legally required despite the conflict of interest. If the official can establish that his or her participation is legally required, he or she may participate in the governmental decision despite the conflict of interest. (See 2 Cal. Code Regs. § 18708.)

2 Cal. Code Regs. § 18702(b).

The parties do not dispute that this is the appropriate procedure to follow in determining whether a violation of the PRA has occurred.

C. Applying the Eight Step Process.

1. Is Starrh a Public Official?

The first question is "whether the individual is a public official, within the meaning of the Act. If the individual is not a public official, he or she does not have a conflict of interest within the meaning of the Political Reform Act." 2 Cal. Code Regs. § 18700(b) (1) (internal citations omitted).

California Government Code section 82048 defines "public official" to mean "every member, officer, employee or consultant of a state or local government agency." Title 2, of the California Code of Regulations, section 18701 defines "member" to include "salaried or unsalaried members of committees, boards or commissions with decisionmaking authority." "A committee, board

1 or commission possesses decisionmaking authority whenever...[i]t
2 may make a final governmental decision...." *Id.*

3 There is no dispute that Starrh, who is the Treasurer of the
4 Belridge Board, a public entity that possesses decisionmaking
5 authority, is a public official under the meaning of the PRA.

6 2. Did Starrh Participate in Making a Governmental
Decision?

7 The second step examines whether Starrh "ma[de],
8 participat[ed] in making, or us[ed] or attempt[ed] to use his/her
9 official position to influence a government decision." 2 Cal.
10 Code Regs. § 18700(b) (2) (internal citations omitted).

11 Title 2 of the California Code of Regulations, section
12 18702, refers in turn to section 18702.1(a), for the following
13 definition:

14 A public official "makes a governmental decision,"
15 except as provided in 2 Cal. Code Regs. section
16 18702.4, when the official, acting within the authority
17 of his or her office or position...votes on a
matter....

18 (Emphasis added.)

19 There is no dispute that Defendant Starrh, by voting on the
February 16, 2005 motion, made a governmental decision.

20 3. What are Starrh's Economic Interests?

21 The third identifies "the public official's economic
22 interests." 2 Cal. Code Regs. § 18700(b) (3) (internal citations
omitted).

23 A public official has an economic interest in a business
entity if "[t]he public official is a director, officer, partner,
24 trustee, employee, or holds any position of management in the
trustee, employee, or holds any position of management in the
25 business entity.". § 18703.1.

1 Here, it is not disputed that Starrh is a partner in Starrh
2 & Starrh Cotton Growers, a California general partnership. (UMF
3 12.) Defendant Starrh is one of four partners, whose ownership
4 interests are equal. (UMF 16, 21.) Starrh & Starrh Cotton
5 Growers owns 6,441.91 acres in the District, and holds a total of
6 15,478.70 acre feet (AF) district water service entitlement, of
7 which 2,180.31 AF (41%) is Top Contract entitlement. (UMF 15)

8 4. Is Starrh's Economic Interest in Starrh & Starrh
9 Cotton Growers a Direct or Indirect Interest?

10 The next step examines whether "each of the public
11 official's economic interests...is directly or indirectly
12 involved in the governmental decision...." 2 Cal. Code Regs. §
13 18700(b) (4) (internal citations omitted). The Code of Regulations
14 contains numerous sets of rules to determine whether an economic
15 interest is "direct" or "indirect," depending on the type of
16 interest.

17 For the business interest at issue here, the definition of a
18 "direct" interest is provided by section 18704.1:

19 (a) A person, including business entities, sources of
20 income, and sources of gifts, is directly involved in a
decision before an official's agency when that person,
either directly or by an agent:

21 (1) Initiates the proceeding in which the decision
22 will be made by filing an application, claim,
appeal, or similar request or;

23 (2) Is a named party in, or is the subject of, the
24 proceeding concerning the decision before the
official or the official's agency. A person is the
25 subject of a proceeding if a decision involves the
issuance, renewal, approval, denial or revocation
of any license, permit, or other entitlement to,
or contract with, the subject person.

26 Here, Plaintiffs assert that Starrh "initiated" the proceeding by
27 voting to approve the motion at the February 16, 2005 meeting.

1 Voting, however, is not included in the definition of "initiates"
2 provided in section 18704.1, which includes "filing an
3 application, claim, appeal, or similar request...."¹ Nor was
4 Starrh or Starrh & Starrh Cotton Growers a named party or the
5 subject of the decision. Starrh's economic interest was not
6 directly affected. As a partner in Starrh & Starrh Cotton
7 Growers, Starrh's economic interest was "indirectly" affected, if
8 at all by the potential impact the February 16, 2005 vote would
9 have on the availability of Top Contract water.

10 5. What Materiality Standard Applies?

11 The fifth step requires a determination of "the applicable
12 materiality standard for each economic interest, based upon the
13 degree of involvement [direct or indirect]...." 2 Cal. Code
14 Regs. § 18700(b)(5) (internal citations omitted).

15 Having found Starrh's economic interest is indirectly,
16 rather than directly, involved, the regulations require
17 application of the materiality standards of California Code of
18 Regulations, title 2, section 18705.1(c) (applicable to economic
19 interests in business entities). See § 18704.1.

20 Section 18705.1(c) provides a number of different paths for
21 determining materiality:

22
23
24 ¹ Plaintiffs also assert that Mr. Starrh's partner
25 initiated the proceeding by requesting in a letter that the Board
26 determine that NSA entitlement could not be moved from the NSA.
27 Assuming, arguendo, the letter request to the Board to draft a
28 non-transfer policy is "initiation," plaintiffs do not explain
why or provide any legal authority suggesting that actions taken
by Defendant Starrh's business partners satisfy the requirement
that Mr. Starrh initiate the proceedings.

1 Indirectly involved business entities. The following
2 materiality standards apply when a business entity in
3 which a public official has an economic interest is
4 indirectly involved in a governmental decision. If more
than one of the following subdivisions is applicable to
the business entity in question, apply the subdivision
with the highest dollar thresholds.

5 (1) If the business entity is listed in the
6 Fortune 500, the financial effect of a
governmental decision on the business entity is
material if it is reasonably foreseeable that:

7 (A) The governmental decision will result in
8 an increase or decrease in the business
entity's gross revenues for a fiscal year of
9 \$10,000,000 or more; or

10 (B) The governmental decision will result in
11 the business entity incurring or avoiding
additional expenses or reducing or
eliminating existing expenses for a fiscal
12 year in the amount of \$2,500,000 or more; or

13 (C) The governmental decision will result in
14 an increase or decrease in the value of the
business entity's assets or liabilities of
15 \$10,000,000 or more.

16 (2) If the business entity is listed on the New
17 York Stock Exchange, or if not listed on the New
18 York Stock Exchange, for its most recent fiscal
19 year had earnings before taxes of no less than
\$2.5 million, or such other amount described at
20 Rule 102.01C of the New York Stock Exchange's
Listed Company Manual (or any superseding rule of
21 the New York Stock Exchange describing its
financial standards for initial listing), the
financial effect of a governmental decision on the
business entity is material if it is reasonably
foreseeable that:

22 (A) The governmental decision will result in
23 an increase or decrease to the business
entity's gross revenues for a fiscal year in
24 the amount of \$500,000 or more; or,

25 (B) The governmental decision will result in
26 the business entity incurring or avoiding
additional expenses or reducing or
eliminating existing expenses for a fiscal
27 year in the amount of \$200,000 or more; or,

28 (C) The governmental decision will result in
an increase or decrease in the value of

1 assets or liabilities of \$500,000 or more.

2 (3) If the business entity is listed on either the
3 NASDAQ or American Stock Exchange, or if not so
4 listed, for its most recent fiscal year had: net
5 income of no less than \$500,000 (or such other
6 amount described in the minimum financial
7 requirements for continued listing on the NASDAQ
8 SmallCap market), or earnings before taxes of no
9 less than \$750,000 (or such other amount of
earnings before taxes described under initial
listing standard 1 of Section 101(a) of the Rules
of the American Stock Exchange, or any superseding
Section of the Rules of that Exchange), the
financial effect of a governmental decision on the
business entity is material if it is reasonably
foreseeable that:

10 (A) The governmental decision will result in
11 an increase or decrease to the business
entity's gross revenues for a fiscal year in
the amount of \$300,000 or more; or,

12 (B) The governmental decision will result in
13 the business entity incurring or avoiding
14 additional expenses or reducing or
eliminating existing expenses for a fiscal
15 year in the amount of \$100,000 or more; or,

16 (C) The governmental decision will result in
17 an increase or decrease in the value of
assets or liabilities of \$300,000 or more.

18 (4) If the business entity is not covered by
19 subdivisions (c)(1)-(3), the financial effect of a
governmental decision on the business entity is
material if it is reasonably foreseeable that:

20 (A) The governmental decision will result in
21 an increase or decrease in the business
entity's gross revenues for a fiscal year in
the amount of \$20,000 or more; or,

22 (B) The governmental decision will result in
23 the business entity incurring or avoiding
24 additional expenses or reducing or
eliminating existing expenses for a fiscal
25 year in the amount of \$5,000 or more; or,

26 (C) The governmental decision will result in
27 an increase or decrease in the value of the
business entity's assets or liabilities of
\$20,000 or more.

28 (emphasis added.)

1 No party presents evidence to address application of this
2 provision. The court can take judicial notice of the fact that
3 Starrh & Starrh Cotton Growers is not on the Fortune 500 list nor
4 is it listed on the NYSE, NASDAQ, or American Stock Exchange,²
5 but it is not possible on this record to determine whether the
6 alternative financial thresholds are met. For this reason alone,
7 it is inappropriate to grant summary judgment to Plaintiff.

8 6. Was it Reasonably Foreseeable that the
9 Governmental Decision Would Have a Material
10 Financial Effect on Defendant Starrh's interest in
11 Starrh & Starrh Cotton Growers.

12 The next step determines: "whether it is reasonably
13 foreseeable that the governmental decision will have a material
14 financial effect...on each economic interest identified...." 2
15 Cal. Code Regs. § 18700(b)(6). Giving the benefit of the doubt
16 to Plaintiffs that the lowest possible financial threshold, that
17 from section 18705.1(c)(4), applies, any financial effect of the
18 governmental decision on Starrh & Starrh Cotton Growers is
19 "material" if it is "reasonably foreseeable" that:

20 (A) The governmental decision will result in an
21 increase or decrease in the business entity's gross
22 revenues for a fiscal year in the amount of \$20,000 or
23 more; or,

24 (B) The governmental decision will result in the
25 business entity incurring or avoiding additional
26 expenses or reducing or eliminating existing expenses
27 for a fiscal year in the amount of \$5,000 or more; or,

28 (C) The governmental decision will result in an
29 increase or decrease in the value of the business
30 entity's assets or liabilities of \$20,000 or more.

31 § 18705.1(c)(4).

32

33 ² This information is readily available in the public record. See
34 http://money.cnn.com/magazines/fortune/fortune500/2008/full_list/;
35 <http://www.amex.com/>; <http://www.nasdaq.com>; <http://www.nyse.com>/

1 First, Plaintiffs assert that Defendant Starrh has
2 stipulated to the issue of materiality, pointing to Defendant's
3 Trial Brief in the Kern County case, which states: "Mr. Starrh[]
4 has stipulated to materiality to avoid production of confidential
5 business information...." (Doc. 126, Att. I to Pls. Repl. Br. at
6 13:21-23.) Plaintiffs, in essence, ask that Mr. Starrh's
7 stipulation in the Kern County case be given collateral estoppel
8 effect. However, "facts established by stipulations or
9 concessions..., rather than by judicial resolution, are not fully
10 litigated and do not have collateral estoppel effect," *Western*
11 *Parcel Exp. v. United Parcel Serv. of Am., Inc.*, 65 F. Supp. 2d
12 1052, 1061 (N.D. Cal. 1998) (citing *Sekaquaptewa v. MacDonald*, 575
13 F.2d 239, 247 (9th Cir. 1978)), unless the parties have
14 manifested an intention to that effect, *Sekaquaptewa*, 575 F.2d
15 247. The stipulation by Mr. Starrh in the Kern County Superior
16 Court may have effect as a judicial admission, even if the
17 parties did not intend it to have collateral estoppel effect.
18 However, counsel for Mr. Starrh represented at oral argument that
19 the stipulation, which was agreed to in principle but never
20 finalized in writing, was to be strictly limited in its effect to
21 the Kern County case. It is therefore not binding here.

22 It is undisputed that Starrh & Starrh Cotton Growers owns
23 6,441.91 acres in the District, and a total of 15,478.70 AF of
24 entitlement, of which 2,180.31 AF (41%) is Top Contract
25 entitlement. (UMF 15.)

26 Plaintiffs maintain that the 2,180.31 AF of Top Contract
27 Water held by Starrh & Starrh should be assigned a value of
28 \$3,000/AF, which was the price paid by Coachella Valley Water

1 District in a 2005 purchase of water from the Berrenda Mesa Water
2 District. At \$3,000/AF, the 2180.31 AF of Top Contract water
3 held by Starrh & Starrh Cotton Growers would be worth
4 \$6,540,930.00. Plaintiffs argue that the one-quarter interest in
5 Starrh & Starrh Cotton Growers held by Defendant Starrh should
6 therefore be valued at \$1,358,684.00. Plaintiffs then suggest
7 that because this number far exceeds the \$20,000 threshold
8 contained in § 18705.1(c)(4), it was reasonably foreseeable that
9 the February 16, 2005 vote would have a material financial effect
10 on Defendant Starrh's economic interests.

11 There are a number of flaws in Plaintiffs' argument. At the
12 outset, Defendants dispute the \$3,000/AF value assigned to the
13 water entitlement. Defendants maintain that the Barrenda Mesa
14 water right was permanent and freely alienable, unlike the Top
15 Contract entitlement which is subject to reduction, and is not
16 freely alienable, as the District must approve any sales and
17 transfers. Moreover, Defendants point out that in a January 10,
18 2005 letter, Plaintiffs expressed belief that their NSA
19 entitlement was worth \$1,000/AF. (Hammet Decl. at Ex. G.)
20 Plaintiffs rejoin that at the very least, the entitlements are
21 worth \$2,100/AF, the price of an entitlement purchased by
22 Coachella Valley Water District from Tulare Lake Basin Water
23 Storage District, but provide no explanation as to why that water
24 transfer is any more reliable as a measure of the value of the
25 Top Contract water entitlement.

26 Other issues raised by Plaintiffs' analysis make it
27 unnecessary to decide the value of an acre-foot of water. First,
28 Plaintiffs do not consider Top Contractors' costs as well as

1 benefits. They are required to pay fees to Belridge regardless
2 of the volume of Top Contract water available. Defendants
3 Phillimore and Starrh assert that the Top Contract water has very
4 little value because it is not freely alienable, is subject to
5 reduction, is only a temporary right to water, and in a wet year
6 may be a burden to their businesses, because Top Contract water
7 may cost more than water purchased in the open market.

8 Second, Plaintiffs do not quantify the extent to which,
9 considering the costs of the Top Contract, the February 16, 2005
10 vote actually added to the value of the Top Contracts.³ The
11

12 ³ Alternatively, Plaintiffs argue that Defendants
13 "conceded" that Defendant Starrh's economic interest was
14 materially effected by the February 16, 2005 vote because of the
15 "strenuous opposition mounted against the transfer requests
16 pending at the time of the" vote. (Doc. 117-2 at 8.)

17 Specifically, Plaintiffs point to a letter submitted on
18 behalf of Starrh & Starrh Cotton Growers which argued that NSA
19 entitlement only gains value if the Board acts to permit the
20 entitlement to be moved. (UMF 22.) Plaintiffs fail to explain
21 how this "concession" is relevant to this case, as the letter
22 only stated the fact that a water entitlement without water
23 service is valueless, whereas a water entitlement with service
24 has value.

25 Plaintiffs also point to a letter submitted to Belridge on
26 behalf of Defendants Phillimore and Baker, which argued that
27 because "water prices have recently increased dramatically for
28 permanent transfers, including those out of the NSA...[p]ermanent
transfers of water entitlement allocated to NSA lands would
result now in a significant financial benefit to NSA landowners
without any significant expenditures on their part." (UMF 24.)
Plaintiffs appear to suggest that because Defendants acknowledge
that NSA entitlements would have value if they were to be
transferred to SA lands, this is a concession of as to the Top
Contract entitlements. However, even if these letters were
interpreted as conceding that the Top Contract entitlements have
value, they do not concede that the February 16, 2005 vote
materially affected the value of the entitlements, nor that any

1 record only reveals that the inability to transfer NSA water to
2 SA lands would likely ensure greater deliveries under the Top
3 Contract. However, the size of the delivery curtailments that
4 would result from their proposed NSA to SA transfer is not
5 presented.

6 Without information regarding the likely impact of the
7 February 26, 2005 vote on Top Contract deliveries, it is
8 impossible to conclude that the vote resulted in a more than a
9 \$20,000 increase in the value of Defendant Starrh's 1/4 interest
10 in Starrh & Starrh Cotton Growers. Whether the materiality
11 requirement is satisfied remains in dispute. Summary judgment is
12 inappropriate.

13 7. Does the Public Generally Exception Apply?

14 The seventh step addresses whether the "reasonably
15 foreseeable financial effect is distinguishable from the effect
16 on the public generally." The public generally exception was
17 previously addressed in the first motion to dismiss:

18 Defendants argue that Plaintiffs' PRA claim should be
19 dismissed as a matter of law because their actions were
20 proper under a provision of the PRA which exempts from
21 its prohibitions decisions made by Directors who are
22 affected by the subject matter of their vote in the
23 same manner as the "public generally." Cal. Gov. Code
24 § 87103. The PRA's implementing regulations contain a
25 number of provisions further explaining the application
26 of the "public generally" exception. Defendants point
specifically to Title 2 of the California Code of
Regulations § 18707.2, titled "Special Rule for Rates,
Assessments, and Similar Decisions," which provides:

27

28 The financial effect of a governmental decision on
the official's economic interest is
indistinguishable from the decision's effect on
the public generally if any of the following

such added value exceeds the expenses incurred under the Top
Contract.

1 apply:

- 2 (a) The decision is to establish or adjust
3 assessments, taxes, fees, charges, or rates
4 or other similar decisions which are applied
5 on a proportional basis on the official's
economic interest and on a significant
segment of the jurisdiction, as defined in 2
Cal. Code of Regulations, section 18707.1(b).
- 6 (b) The decision is made by the governing board
7 of a landowner voting district and affects
8 the official's economic interests and ten
percent of the landowners or water users
subject to the jurisdiction of the district
in proportion to their real property
interests or by the same percentage or on an
"across-the-board" basis for all classes.
- 10 (c) The decision is made by the governing board
11 of a water, irrigation, or similar district
12 to establish or adjust assessments, taxes,
fees, charges, or rates or other similar
decisions, such as the allocation of
services, which are applied on a proportional
or "across-the-board" basis on the official's
economic interests and ten percent of the
property owners or other persons receiving
services from the official's agency.

16 The decision in question, the February 16, 2005 vote to
17 prohibit the transfer of NSA water to SA lands, is not
even arguably an assessment, tax, charge, fee, rate, or
other similar decision, so sub-parts (a) and (c) do not
apply. Defendant strenuously maintains, however, that
subpart (b) does apply to the facts of this case. The
parties point to no authority construing the language
of §§ 18707.2(b). The applicability of this provision
to the facts of this case presents several unique
questions that have not yet been addressed by any
court.

22 Specifically, Defendants maintain that the February 16,
23 2005 vote affected at least ten percent of the other
"landowners or water users subject to the jurisdiction
of the district in proportion to their real property
interests or by the same percentage or on an
'across-the-board' basis for all classes." Defendants
make a critical assumption in support of this
assertion: that the February 16, 2005 decision,
affects all District landowners in the same way,
because it prohibits all landowners from transferring
their NSA water to SA lands. Operating under this
assumption, Defendants present various arithmetical
analyses of the individual Defendants' property

1 interests vis-a-vis all other Belridge landowners.
2 Based on these analyses, Defendants contend that the
3 decision affects at least ten percent of the non-voting
4 landowners. Assuming, arguendo, the validity of
5 Defendants' fundamental assumption, their calculations
6 appear to satisfy the ten percent rule.

7 Plaintiffs argue, however, that Defendants' fundamental
8 assumption is flawed, and maintain that the February 16
9 decision does not affect all District landowners in the
10 same way, because it financially benefits those
11 district landowners who are parties to the Top Contract
12 while not providing similar financial benefits to other
13 district landowners.

14 Plaintiffs' view of the effect of the February 16
15 decision is the more persuasive, particularly in light
16 of the purpose of the PRA. Here, the Plaintiffs allege
17 (and Defendants do not appear to dispute) that the
18 operative effect of individual landowners transferring
19 NSA entitlement to SA lands is to diminish the amount
20 of water available under the Top Contract.
21 Accordingly, prohibiting such transfers (permanently or
22 temporarily) will ensure that the parties to the Top
23 Contract have exclusive access to these (valuable)
24 surplus water entitlements. The PRA is designed to
25 ensure that "[n]o public official at any level of state
26 or local government shall make, participate in making
27 or in any way attempt to use his official position to
28 influence a governmental decision in which he knows or
29 has reason to know he has a financial interest." Cal.
30 Gov. Code § 87100. Although the February 16, 2004
31 decision does not directly reference the Top Contract,
32 the beneficial effect of the decision upon parties to
33 the Top Contract is undeniable as the vote ensures that
34 Plaintiffs' NSA water is available to be allocated to
35 the Directors' Top Contract claims.

36 Assuming that the February 16, 2005 decision affects
37 the parties to the Top Contract differently from the
38 remaining landowners, the question then becomes whether
39 § 18707.2(b) nevertheless shields Defendants. With
40 respect to this inquiry Plaintiffs raise an important
41 threshold question: Does § 18707.2(b) even apply to a
42 decision that affects one group of landowners
43 differently from its effect on other landowners. The
44 plain language of the provision, suggest that it does
45 not. Section 18707.2(b) provides for an exception from
46 the PRA when:

47 The decision is made by the governing board of a
48 landowner voting district and affects the
49 official's economic interests and ten percent of
50 the landowners or water users subject to the
51 jurisdiction of the district in proportion to

1 their real property interests or by the same
2 percentage or on an "across-the-board" basis for
3 all classes.

4 According to the plain language of the provision, an
5 official may participate in making a decision, even if
6 the decision affects the official's economic interests,
7 if the decision also affects ten percent of the
8 landowners or water users subject to the jurisdiction
9 of the district in a proportional manner. The
10 provision offers three alternative ways to calculate
11 whether ten percent of other landowners are affected:
12 (1) in proportion to their real property interests; (2)
13 by the "same percentage"; or (3) on an "across the
14 board basis." No further definitions or guidance is
15 provided. The "across the board" option is fairly
16 self-explanatory and applies only if all landowners are
17 affected equally by a decision. For example, if all
18 landowners were assessed a flat fee for a particular
19 administrative service.

20 Although the wording is not particularly clear, a
21 similar interpretation is appropriate for the "by the
22 same percentage" language. For example, if a fee was
23 levied at one percent of the value of a landowner's
24 water entitlement or at a fraction of the total acres
25 owned. The February 16, 2005 decision affects parties
26 to the Top Contract differently from other landowners,
27 and neither the "by the same percentage" nor the
28 "across-the-board" language is applicable here.

29 A more difficult question is whether the February 16,
30 2005 decision affects the Defendant Directors'
31 "economic interests and ten percent of the landowners
32 or water users subject to the jurisdiction of the
33 district in proportion to their real property
34 interests...." § 18707.2(b) (emphasis added). Both
35 parties submit sets of calculations addressing whether
36 or not the ten percent threshold is met, but Plaintiffs
37 assert that these "various arithmetical scenarios"
38 assume too much. (Doc. 45, Pltf's Suppl. Brief, at 2.)
39 Plaintiffs maintain that the "in proportion to their
40 real property interests" language of § 18707.2(b) does
41 not apply because the allocation of benefits under the
42 Top Contract does not track the parties' proportional
43 landownership interests in the District. Plaintiffs
44 appear to be correct.

45 The chart below compiles information from various
46 exhibits in the record. The first two columns list the
47 parties to the Top Contract and which, if any,
48 Defendant is affiliated with those entities. The third
49 column lists the various entities' share of water under
50 the Top Contract. The Fourth presents the entities'
51 share of the total land in Belridge, both in Acreage

and as a percentage share of the total. Finally, the Fifth column shows the entities' share of the total water entitlement actually used in Belridge, exclusive of any entitlement gained under the terms of the Top Contract.

	Parties to Top Contract	Share of Top Contract	Share of Total Land in Belridge	Share of Total Belridge Water Entitlement (actually used)
Defendants Phillimore & Baker	Paramount Business Entities: Paramount Land Company Paramount Citrus Association Paramount Orchards Paramount Farms Belridge New Farming LLC	14.46% 0 0 0 62.84%	6,962.71 A (7.26%) 2,833.75 A (2.95%) 21,257.33 A (22.16%) 396.42 A (0.41%) 0	2,456.17 AF (2.37%) 8,758.14 AF (8.45%) 52,088.69 AF (50.28%) 0 0
Total for Phillimore & Baker		77.3%	32.78%	61.1%
Defendant Starr	Starrh & Starrh Cotton Growers	16.61%	6,444.91 A (6.72%)	13,289.39 AF (12.84%)
Non-Defendant Parties to the Top Contract	BLC Farmlands, LLC	0.16%	80.00 A (0.08%)	159.20 AF (0.15%)
	California Pistachio, Inc.	0.19%	87.17 A (0.09%)	190.81 AF (0.18%)
	Chaparral Industries, Inc.	2.02%	965.93 (1.01%)	2,047.77 AF (1.98%)
	Rod Steifvater	1.00%	2,446.90 A (2.55%)	1,113.83 AF (1.08%)
	Steifvater et al.	1.79%	1277.06 (1.33%)	4,256.24 AF (4.11%)
	Theta Oil and Land Company	0.93%	796.36 (0.83%)	947.96 AF (0.91%)

Without even attempting to apply the ten percent rule, it is evident that the Defendants' share of water under the Top Contract (and therefore the parties' share of the benefits of the Top Contract) does not track either their proportional land ownership or their water entitlement. For example, Defendant Starr holds a 16.61% share of water under Top Contract, but 6.72% of the total land in Belridge and 12.84% of the total used water entitlement. Similarly, Defendants Pillimore and Baker, who are together affiliated with the Paramount

1 entities and Belridge New Farming, hold a 77.3%
2 interest in the Top Contract, but (counting all of
3 their related entities) only 32.78% of the total
4 acreage in Belridge and 61.1% of the total used water
5 entitlement. Some of the non-defendant parties to Top
6 Contract hold shares in the Top Contract that are
7 similar to their overall share of Belridge's used water
8 entitlement (for example, BLC Farmlands, California
9 Pistachio, Chaparral, and Theta Oil), but such is not
10 the case with the Steifvater entities. Overall, the
11 record reveals that Defendants' collective share in the
12 Top Contract is disproportionately larger than their
13 share of either the land in Belridge or of the used
14 water entitlement. It is inappropriate to apply §
15 18707.2(b), which is supposed to exempt officials who
16 make decisions affecting their own economic interests
17 only if the decision also affects "ten percent of the
18 landowners or water users subject to the jurisdiction
19 of the district in proportion to their real property
20 interests...." (emphasis added).

21 Under the facts and circumstances of this case,
22 applying the § 18707.3(b) exemption would not comport
23 with the over-arching purpose of the PRA: to ensure
24 that "[n]o public official at any level of state or
25 local government shall make, participate in making or
1 in any way attempt to use his official position to
2 influence a governmental decision in which he knows or
3 has reason to know he has a financial interest." Cal.
4 Gov. Code § 87100. Although the parties have not
5 pointed to any legislative history, judicial
6 interpretation, or administrative guidance on the
7 intended scope and purpose of § 18707.2(b), it is
8 reasonably inferred that the purpose of the exception
9 is to permit interested directors to only make
10 decisions for landowner voting districts when these
11 decisions affect all landowners in a fair and even-
12 handed manner. The complaint alleges that Defendants'
13 actions have preferred their economic self-interest to
14 the detriment of other district members.

15 Defendants' motion to dismiss Plaintiffs' PRA claim is
16 DENIED.

17 (Doc. 48 at 29-38.)

18 Plaintiffs assert that this ruling amounts to a dispositive
19 decision on the applicability of the "public generally"
20 exception. (Doc. 117-2 at 11.) Defendants rejoin that an order
21 on a motion to dismiss is an "interlocutory order" that cannot
22 constitute a "final dispositive finding of fact or law," and may

1 be reconsidered and ultimately changed. Defendants are only
2 partially correct. A motion to dismiss can be dispositive as to
3 matters of law, not matters of fact. Although interlocutory
4 orders may be reconsidered, Defendants have not moved for
5 reconsideration or presented any grounds for reconsideration of
6 the ruling on this issue.

7 As to the effect of the above-quoted decision, in evaluating
8 a motion to dismiss, the district court must take the facts
9 presented and view them in the light most favorable to the non-
10 moving party. In this case, the district court examined the
11 limited factual record and concluded that "[u]nder the facts and
12 circumstances of this case, applying the § 18707.3(b) exemption
13 would not comport with the over-arching purpose of the PRA...."
14 (Doc. 48 at 38.) Because the issue was a mixed question of fact
15 and law, it is not appropriate to treat the ruling on the motion
16 to dismiss as dispositive of the applicability of the "public
17 generally" exception. Defendants will be permitted to present
18 evidence on this issue in later stages of this litigation.

19 8. Was Starrh's Participation in the Vote Legally
20 Required?

21 The final step requires a determination of whether "the
22 public official's participation is legally required despite the
23 conflict of interest." 2 Cal. Code Regs. § 18700(b)(8). If so,
24 the government official can participate in the decision
25 notwithstanding any conflict of interest. *Id.* Here, however,
26 there is no assertion that Defendant Starrh was legally required
27 to vote on the February 16, 2005 matter.
28

1 D. Other Defenses Asserted.

2 For the first time in these proceedings, Defendants assert
3 that several new exceptions to the PRA apply here. First,
4 Defendants argue that an exception to the PRA applies for issues
5 that "will affect a [predominant] industry, trade, or profession
6 [within the jurisdiction] in substantially the same manner as the
7 decision will affect an official's economic interest." Cal. Code
8 Regs. § 18707.7 (the "Predominant Industry Exception"). This
9 exception applies when an industry that constitutes 50 percent or
10 more of the business entities in the district that the official
11 represents. Defendants assert that Belridge is largely rural and
12 agriculture is the predominant industry because more than half of
13 the business entities in Belridge are engaged in agricultural
14 activities. (Doc. 122-4, Hammett Decl. at ¶12.)

15 Second, Defendants maintain that an exception for "Business
16 Entities" applies:

17 For decisions that affect a business entity in which a
18 public official has an economic interest, the decision
19 also affects either 2,000 or twenty-five percent of all
20 business entities in the jurisdiction or the district
the official represents, so long as the effect is on
persons composed of more than a single industry, trade
or profession.

21 Cal. Code Regs. § 18707.1(b) (1) (c) .

22 Third, Defendants argue that the following "catch-all"
23 exception applies:

24 The decision will affect a significant segment of the
25 population which does not meet any of the standards in
26 subsections(b) (1) (A) or (b) (1) (D), however, due to
exceptional circumstances regarding the decision, it is
determined such segment constitutes a significant
segment of the public generally.

27 § 18707.1(b) (1) (E) (emphasis added). Thus, if exceptional
28 circumstances exist to define the portion of the population

1 affected by the decision as a "significant" segment and the
2 impact on that portion of the population is substantially the
3 same as the impact on the public official, then the public
4 generally exception applies. § 18707.1(b). Defendants
5 acknowledge that the PRA does not contain any further guidance on
6 what constitutes "exceptional circumstances."

7 Plaintiffs maintain that Defendants cannot assert any of
8 these defenses because they failed to plead them as affirmative
9 defenses in their answer.⁴ The Federal Rules of Civil Procedure
10 require a defendant to plead affirmative defenses in the answer;
11 failure to do so constitutes a waiver of that defense. *James v.*
12 *United States*, 215 F.R.D. 590, 595 (E.D.Cal. 2002) (Fed. R. Civ.
13 Pro. 12(b), 8(c)). Defendants have not moved for leave to amend
14 their answer, nor have they shown good cause for permitting
15 amendment. Absent leave to amend, they cannot now assert
16 defenses they failed to plead in their answer.

17

18

19

20

21 ⁴ Plaintiffs argue, alternatively, that Defendants are
22 estopped from asserting these claims because they stated in a
23 previous motion to dismiss that the defendant directors' vote at
24 the February 16, 2005 meeting was "premised upon the 'public
generally' rule contained in the PRA." (Doc. 17, Def. Mot.
25 Dism., filed May 31, 2005, at 7:2-3.) Plaintiffs claim that this
26 statement was an admission, but, upon closer inspection, it
27 appears that Defendants were merely asserting that the Defendants
28 were advised, prior to their vote, by legal counsel that the
public generally exception applied. Plaintiffs do not explain
why actions of legal counsel would affect the breadth of defenses
available in this litigation.

1 E. Plaintiffs' Requested Relief.

2 Plaintiffs request equitable relief under the PRA,
3 specifically requesting (1) that the February 16, 2005 vote be
4 declared void; and (2) that Belridge be ordered to approve
5 Plaintiffs' request to transfer its NSA entitlement to SA lands.
6 Defendants do not dispute that, if Plaintiffs prevail on the
7 merits of this claim, that they would be entitled to have the
8 vote declared null and void. This is the form of relief
9 specifically provided in the PRA. See Cal. Gov. Code §
10 91003(b) ("If it is ultimately determined that a violation has
11 occurred and that the official action might not otherwise have
12 been taken or approved, the court may set the official action
13 aside as void.")

14 However, the requested injunctive relief is a different
15 question. The PRA does provide for injunctive relief to "enjoin
16 violations of the PRA or to compel compliance with the provisions
17 of the PRA," Cal. Gov. Code § 91003(a), but Plaintiffs do not
18 request this type of injunction. Rather, they request an order
19 requiring Belridge to take affirmative action to approve a
20 request that is distinct from the allegedly unlawful vote. This
21 is not an available remedy for two reasons. First, "[g]enerally,
22 when a new right is created by statute, a party aggrieved by
23 violation of the statute is limited to the statutory remedy if
24 one is provided." *County of San Diego v. State*, --- Cal. Rptr.
25 3d. ---, 2008 WL 2582976, *18 (Cal. App. 4 Dist. 2008) Here,
26 the PRA provides for nullification of the vote and/or prohibitory
27 injunctive relief to prevent further violations, but not
28 mandatory injunctive relief of any other kind. In general, the

1 doctrine of separation of powers precludes a court from interfere
2 with the business of a legislative body through the issuance of a
3 writ of mandate or any other mandatory injunctive relief. *Id.* at
4 *6.

V. CONCLUSION

For the reasons set forth above, Plaintiffs motion for summary judgement on the PRA claim is DENIED.

10 IT IS SO ORDERED.

11 | Dated: August 1, 2008

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE